GOVERNMENT OF MALAYSIA v. CHOP KIAN HOE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Syed Othman F.J.) May 6 & September 15, 1980]

[Kuching — Federal Court Civil Appeal No. 174 of 1979]

Tort — Negligence — Mistake in transmitting telegram — Whether Government liable for loss suffered — Sarawak Telegraph Rules, 1934, r. 3 — Telecommunications Act, 1950 (Act 20), s. 9(1)(a).

Telecommunications — Mistake in transmitting telegram — Liability of Government — Sarawak Telegraph Rules, 1934, r. 3 — Telecommunications Act, 1950 (Act 20), s. 9(1)(a).

Administrative Law — Liability of Government for mistake in transmitting telegram — Monopoly in running telegraphic service — Telecommunications Act, 1950 (Act 20), s. 9(1)(a).

In this case the respondent was a general merchant in Miri, Sarawak, dealing, among other things, in pepper. It had business dealings with a firm in Singapore and they communicated by telegram in code. The respondent had 190.5 pikuls of white pepper stored with the Singapore firm. On June 19, 1970 the respondent received a telegram from the Singapore firm saying that the pepper could be sold at a certain price. The respondent sent a telegram to the Singapore firm in code "Huy Eaz Auv" meaning "Don't sell". But owing to a mistake by somebody in the Post Office, the telegram when received by the Singapore firm read "Huy Ear Aur" meaning "sell". The Singapore firm sold and the respondent alleged that it suffered loss. The respondent sued the Government of Malaysia which operated the Post Office for damages suffered as a result of the "gross negligence of the defendant or their officers or subordinates." The learned trial Judge held that the Government was liable for the loss. The Government appealed.

Held: the Government had a defence as section 9(1) of the Telecommunications Act, 1950 clearly absolved the Government from liability for damages caused by failure of duty on the part of the Post Office employees concerned, even if such failure was proved. Rule 3 of the Sarawak Telegraph Rules, 1934, also makes it clear that Government is not liable for loss or damage caused by inaccuracy of or error in telegrams.

Case referred to:-

(1) *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority* [1971] 2 M.L.J. 27.

[The following cases were also cited to in argument: *Whitfield* v. *Lord Le Despencer* 98 E.R. 1344, 1350; *Harold Stephen & Co. Ltd.* v. *Post Office* [1977] 1 W.L.R. 1172, 1174; *Mac Andrew* v. *Electric Telegraph Company* (1855) 139 E.R. 965, 969.]

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellant.

T.Y. Tai for the respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Lee Hun Hoe C.J. (Borneo) delivering the judgment of the Court): The plaintiff firm is a general merchant in Miri, dealing in, among other things, pepper. It has business dealings with a firm in Singapore. They communicate by telegram in code.

The plaintiff had 190.5 pikuls of white pepper stored with the firm in Singapore. The plaintiff's idea was naturally to sell the pepper at a profit.

On June 19, 1970, the plaintiff received a telegram from the Singapore firm saying that the pepper could be sold at a certain price.

On the same day the plaintiff sent a telegram to the Singapore firm in code, "Huy Eaz Auv" meaning "don't sell". But owing to a mistake made by somebody in the Post Office, the telegram when received by the Singapore firm read "Huy Ear Aur", meaning "sell". The Singapore firm sold, and the plaintiff alleged that it thereby suffered a loss of $18,669, thus:

Cost of the pepper bought by plaintiff at $270 per pikul	$ 51,435
Sold by the Singapore firm at $172 per pikul	$ 32,766
	$ 18,669

The plaintiff sued the Government of Malaysia which operate the Post Office for damages suffered as a result of "the gross negligence of the defendant or their officers or subordinates."

Thus the issue here is whether or not the Government is liable for the loss suffered by the plaintiff because some one in the Post Office has made a mistake in transmitting the telegram.

The defendant pleaded, among other things, that they are absolved from liability by Rule 3 of the Sarawak Telegraph Rules, 1934, which reads:

"3. The Telegraph Authority undertakes to adopt all necessary measures to ensure the secrecy of telegrams and their prompt despatch, but does not hold itself legally responsible for the accuracy of telegrams, nor for the consequences of non-delivery, errors or delay."

But at the trial, attention was concentrated on section 9(1)(a) of the Telecommunications Act, 1950, Act 20, applied to Sarawak by the Modification of Laws (Telecommunications) Order, 1968, P.U. 278/68. That section provides:

"9. (1) The Government shall not be responsible for any loss or damage which may occur in consequence —

(a) of any telecommunication officer failing in his duty with respect to the receipt, transmission or delivery of any message; or

(b) of any failure of telecommunication plant.

(2) No telecommunication officer shall be responsible for any such loss or damage unless he causes the same negligently, maliciously or fraudulently."

On the application of Mr. Lim Beng Choon, on behalf of the Government, the learned trial judge agreed to dispose of the legal defence raised by the Government before the trial, under Order 25 rule 2.

In the event the learned judge decided against the Government. Briefly he held that section 13 of the United Kingdom Post Office Act, 1808, which reads:

"13. Liability for loss of postal packets. The registration of or giving a receipt for a postal packet, or the giving or obtaining of a certificate of posting or delivery of a postal packet, shall not render the Postmaster-General or the Post Office revenue in any manner liable for the loss of the packet or the contents thereof."

is not the same as our section 9 and that our section 9 is quite similar to rule 91(1) of the Port Swettenham Authority By-laws, 1965, which reads:

"The Port Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or for any other cause unless such loss ... has been caused solely by the misconduct or negligence of the Authority or its officers or servants."

The learned judge said that the operative words

in section 9(1)(a) are "failing in his duty", that their meaning is wider than the meaning of the word "negligence", that in view of subsection (2) of section 9 the legislature may not have intended to excuse Government from liability for the negligence of their servants, that failure of duty must be proved by those relying on it, that following *Sharikat Lee Heng Sdn. Bhd.* v. *Port Swettenham Authority*[1] the onus of proving that is on the Government and that since as yet there was no such proof the defence contention must be dismissed.

With respect it is difficult to follow the learned judge's reasoning regarding failure of duty, as arguments were advanced by Mr. Lim on the basis that there had been a failure of duty on the part of some one in the Post Office. Otherwise, there would not have been any mistake in the content of the telegram received by the Singapore firm.

With respect, the learned judge was in error in holding that Government has no defence.

This is not like the run-of-the-mill running down cases involving, say, a PWD lorry driver who ran down and injured the plaintiff who then sues in negligence both the Government as the driver's employer and the driver as the Government's agent or servant. In this case the plaintiff has not sued the Post Office employee who actually transmitted the telegram. It sued only the Government — in negligence as already stated.

Here it is important to observe that section 9 draws a distinction between the liability of the Government and the liability of their telecommunication officers.

As regards the latter, subsection (2) clearly provides that a telecommunication officer is liable for any loss occasioned by a mistake in a telegram if he caused the loss "negligently, maliciously or fraudulently." As regards Government on the other hand, subsection (1) clearly provides that "Government shall not be responsible for any loss or damage which may occur in consequence of any telecommunication officer failing in his duty with respect to the receipt, transmission or delivery of any message." No words can be clearer than these to absolve Government in the circumstances of this case from liability for damages caused by failure of duty on the part of the Post Office employees concerned, even if such failure has been proved to the hilt.

Parliament by the Telecommunications Act has given the Post Office a monopoly in running the telegraphic service. It is a vital public service. In determining charges for telegrams, the Post Office must have had regard to the exemption from liability given to it by section 9; if Government is to be held liable for over $18,000 in return for the few dollars charged for this telegram, the public would have to be asked to pay prohibitive charges for telegrams.

With respect we do not agree that section 9 is similar to rule 91(1) of the Port Swettenham Authority Rules, 1965. There the words which follow the word "unless" show that the Authority does not enjoy absolute exemption from liability, and is liable if loss has been caused solely by the misconduct or negligence of the Authority or its officers and servants. Here, on the contrary, subsection (1) of section 9 emphatically states that Government shall not be responsible for any loss occasioned by any telecommunication officer failing in his duty with respect to the transmission of any message. If indeed, the plaintiff can prove such failure amounting to negligence, he may sue the officer. It is, however, unlikely that any plaintiff can find such proof, in the labyrinth of the bureaucracy. But presumably the Post Office will take disciplinary proceedings against him, and in extreme circumstances the Public Prosecutor may even prosecute him under Part IV of the Act.

Rule 3 of the Telegraph Rules also makes abundantly clear that Government is not liable for loss or damage caused by inaccuracy of or error in telegrams.

Fcr the above reasons, we would allow this appeal with costs.

Appeal allowed.

Solicitors: *Tai & Co.*

SORNARATNAM & ANOR. v. RAMALINGAM

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Salleh Abas F.JJ.) August 4 & September 16, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 117 of 1979]

Practice and Procedure — Appeal — Finding of fact by trial court —Appellate court not entitled to overrule finding.

In this case the learned President of the Sessions Court had held after hearing the evidence that the monthly payments amounting to a total of $4,600 made by the respondent were paid not towards the repayment of the loan of $5,000 but by way of profits from the commercial venture which the respondent was then undertaking partly with the money borrowed from the appellant's husband. He therefore gave judgment for the appellant for the $5,000. On appeal the learned judge of the High Court disagreed with this finding and ordered a retrial.

Held: the finding of fact by the President, Sessions Court was one made by him not only in the setting of the demeanour of the witnesses whom he had the advantage of seeing and hearing but also as a matter of reasonable inference from evidence which was common to both sides. Such a finding was clearly one which no appellate court was entitled to overrule.

Case referred to:-

(1) *Oh Hiam & Ors.* v. *Tham Kong* [1980] 2 M.L.J. 159.

FEDERAL COURT.

C. Jegathesan for the appellants.

H.B. Ball for the respondents.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): This is an appeal from the decision of the High Court which overruled the judgment of the President Sessions Court in favour of the appellant in her action for money had and received.

There is no serious dispute of facts, save on one matter. The appellant's husband had in his lifetime lent the respondent two sums of money, $20,000 in the first instance and then $5,000. It is common to both that the $20,000 had been repaid, and also that the respondent had been making monthly payments of $100 to the appellant to the total sum of $4,600. The dispute is over the nature of these monthly payments. If they were towards repayment of the sum